Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

SHERRY MICHALS,
Petitioner,

v.

BAXTER HEALTHCARE CORPORATION AND BAXTER INTERNATIONAL, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CURT L. SITLINGER
Counsel of Record
SITLINGER, MCGLINCY, THEILER & KAREM
STARKS BUILDING, SUITE 370
455 S. FOURTH AVENUE
LOUISVILLE, KY 40202
(502) 589-2627

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in its decision and whether its application of the "Discovery Rule" conflicts with other United States Courts of Appeals on this issue.

2. Whether the "Discovery Rule" requires the victim of a latently defective medical product file suit before she is actually aware of the product's defect.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Sherry Michals, an individual citizen of the United States, residing in the Western District of Kentucky. Petitioner has no corporate affiliations. Sherry Michals was the Plaintiff in the United States District Court for the Western District of Kentucky and the Plaintiff-Appellant in the Sixth Circuit Court of Appeals.

Respondent

Respondents are Baxter Healthcare Corporation and Baxter International, Inc., both publicly traded corporations. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of either corporation's stock. Respondents were the Defendants in the United States District Court for the Western District of Kentucky and the Defendants-Appellees before the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A) is reported at page 1a, 2002 FED App. 0158P (6th Cir.). The District Court opinion (App. B) is reported at page 15a.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on May 6, 2002.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an action arising out of a product liability case wherein Sherry Michals filed a complaint against Baxter Healthcare Corporation and Baxter International, Inc., seeking damages as a result of defective breast implants. Thereafter, Baxter filed its Motion for Summary Judgment alleging that Sherry Michals' cause of action was time barred pursuant to Kentucky Revised Statute 413.140.

The District Court granted Baxter's Motion for Summary Judgment, holding that the one-year statute of limitations for product liability expired on March 9, 1978.

Sherry Michals appealed the District Court Decision to the Sixth Circuit. The panel of judges assigned to the case ruled in Baxter's favor, finding that the date of accrual for

purposes for the statute of limitations was March 9, 1977, at the latest, and that statutory period ran on March 9, 1998, thereby rendering Sherry Michals' 1993 Complaint and the allegations made therein untimely.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's application of the discovery rule in this latent injury case conflicts with decisions of several other United States Courts of Appeals on the issue.

In the majority of tort cases the victim of a legally cognizable injury is aware of her injury as it occurs. The victim's cause of action accrues and the applicable statute of limitations begins to run at the moment the injury is inflicted precisely because of the victim's concurrent awareness of the injury. Courts recognized long ago, however, that in certain cases the victim is unaware of her injury at the time it is inflicted, and that therefore the traditional application of the statute of limitations worked a harsh injustice upon the victim.

In 1949, the United States Supreme Court created the federal discovery rule in *Urie v. Thompson*, 337 U.S. 163 (1949). There the Court held that since there was "no suggestion that [the plaintiff] should have known he had silicosis at any earlier date," his cause of action accrued "'only when the accumulated effects of the deleterious substance manifest[ed] themselves.'" *Urie* at 170. Since that time the discovery rule has been extended to cover cases involving medical malpractice and other latent injuries.

Petitioner contends that the legally cognizable injury she has suffered is just such a latent injury. It is the result of

her unwitting exposure to a defective product placed within her body. Coincidentally, she also experienced *known complications* from that product, including pain, hardness and redness. These known complications became so uncomfortable as to require the removal of the product from the Petitioner's body after a corrective "closed capsulotomy" procedure failed. In its opinion, the Court of Appeals places great emphasis on the fact that the Petitioner had the Heyer-Schulte implants replaced with Dow Corning implants, improperly charging Petitioner with the knowledge of her latent, systemic injuries. However, as in *Urie*, Petitioner Michals can be held to be injured only when the accumulated effects manifest themselves.

As noted by the Fifth Circuit Court of Appeals, courts now recognize that the limitations period in these cases does not run until a plaintiff has discovered both his injury *and its cause*. *Dubois v. Kansas City Southern Railway Co.*, 729 F.2d 1026 (5th Cir. 1984) citing *United States v. Kubrick*, 444 U.S. 111 (1979). In the Petitioner's case, she had no reason to believe that her injuries were the result of silicone poisoning caused by defective breast implants. In fact, this causal relationship was only recently recognized by the manufacturers of these devices and remains an area of great dispute among the medical community. It is wholly unfair to hold Petitioner to a level of knowledge that was not even held by people with a much higher degree of awareness of these problems.

Perhaps the case that most strikingly illustrates the conflicting applications of the discovery rule is *Nicolo v. Phillip Morris, Inc.* (1st Cir.) 201 F.3d 29 (2000). In *Nicolo*, the plaintiff had, by 1988, contracted a series of smoking-related illnesses, including asthma, emphysema, and chronic obstructive pulmonary disease. Five years later, she was

diagnosed as having lung cancer. She brought suit against the appropriate cigarette companies within the statutory limitations period of three years from diagnosis of cancer but not within three years of the onset of the earlier respiratory illnesses. The First Circuit declined to apply an extreme version of a "single injury" concept that would end the plaintiff's suit, but rather applied the discovery rule to vacate summary judgment in favor of the defendants. The Court held that a genuine issue of material fact existed as to whether cancer was so foreseeable as to require that the plaintiff file her complaint when she was diagnosed with her first respiratory ailments. Similarly in Petitioner Michals' case, a genuine issue of material fact remains as to whether the systemic problems she now suffers are so foreseeable as to require that she file back in 1977 when she was experiencing merely hardness, pain and redness.

II.

The decision of the Sixth Circuit in this case departs from its own decisions *Fonseca* and *Johnson v. Sandoz Pharmaceuticals* in reaching its erroneous decision and ignores the facts of the case in holding against the Petitioner.

The decision of the Sixth Circuit in this case is out of step with the Court's own recent decisions on the issue. In *Fonseca v. Consolidated Rail Corp.* (6th Cir.) 246 F.3d 585 (2001), the Court addressed a case that was factually analogous to the one at issue, reversing the district court's grant of summary judgment against the plaintiff. Carlos Fonseca first complained of pain in his hands in 1967, the year he started working full time for Conrail. He was diagnosed with carpal tunnel syndrome in 1997 after working as a laborer for Conrail for some thirty years. Conrail argued

that he should have brought his action by 1970, or within the three-year statutory period after he first complained of hand pain. The Sixth Circuit, however, noted that "[s]uch a result would undermine the purpose of the discovery rule." *Fonseca* at 592.

Another recent unpublished Sixth Circuit case involves a products liability case in which the plaintiff was exposed to allegedly harmful substances. In *Johnson v. Sandoz Pharmaceuticals* (6th Cir.) 24 Fed. Appx. 533 (2001), the Court remanded the case, holding that "Kentucky law requires that a plaintiff be given a reasonable opportunity to discover the causal relationship between the substance and her injury before the statute of limitations clock begins to run against her." (Copy attached). Citing *Louisville Trust Co. v. Johns-Mansville Prods. Corp.* 580 S.W.2d 497 (Ky. 1979).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Curt L. Sitlinger
Counsel of Record
Attorney for Petitioner
370 Starks Building
455 South Fourth Avenue
Louisville, Kentucky 402
Phone:(502) 589-2627
FAX: (502) 583-3415

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6256

[Filed May 6, 2002]

SHERRY MICHALS,
Plaintiff-Appellant,

v.

BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville
No. 93-00663
Charles R. Simpson III, District Judge

JUDGES:
Before MERRITT, CLAY, and GILMAN, Circuit Judges.

OPINION

CLAY, Circuit Judge. Plaintiff, Sherry Michals, appeals from the district court's order granting summary judgment to Defendants Baxter Healthcare Corporation and Baxter International, Inc., on statute of limitations grounds, in this case wherein Plaintiff seeks damages for injuries she allegedly sustained as a result of breast implants manufactured by a corporation now owned by Defendants. This matter is in federal court based on diversity of citizenship, pursuant to 28 U.S.C. § 1332 (a), and jurisdictional amount exceeding $75,000. For the reasons set forth below, we **AFFIRM** the district court's order.

BACKGROUND

Procedural History

Plaintiff filed suit against Defendants on October 23, 1993, seeking damages for injuries she allegedly sustained as a result of silicone breast implants that she received in March of 1974, which were manufactured by Heyer-Schulte, a corporation now owned by Defendants. On June 8, 2000, Defendants filed a motion for summary judgment, claiming that Plaintiff's cause of action was time-barred under the one-year statute of limitations set forth in Kentucky Revised Statute 413.140. On August 23, 2000, the district court entered a memorandum opinion granting Defendants' motion for summary judgment, and on August 29, 2000, the district court entered its corresponding order dismissing Plaintiff's suit. This timely appeal ensued.

Facts

In March of 1974, Dr. Leonard Weiner surgically implanted Heyer-Schulte silicone breast implants in Plaintiff. Plaintiff elected to have this surgery because her breasts had become quite enlarged when she was pregnant with her daughter, and her breasts remained large postpartum due to engorgement which caused a degradation of the contour and support of her breasts. In the two months following the surgery, Plaintiff saw Dr. Weiner three times for follow-up visits. Plaintiff did not see a physician again regarding her breast implants until March of 1976, when she saw Dr. Norman Cole. Plaintiff claims that she went to see Dr. Cole because her "breasts hurt and they were still hard and still red and they were immobile and [she] was getting red rashes across them." In an effort to soften Plaintiff's breasts, Dr. Cole performed a closed capsulotomy on Plaintiff that involved physical manipulation of her breasts in order to break the fibrous capsules. Although the capsulotomy was effective at first, Plaintiff's breasts eventually returned to the hardened state. At that point, Dr. Cole recommended that Plaintiff have the implants removed and replaced.

In March of 1977, Plaintiff underwent surgery to have the Heyer-Schulte implants replaced with Dow Corning implants. In January of 1979, the left implant was replaced with another Dow Corning implant; and, in September of 1992, Plaintiff had both implants removed and replaced with a pair of silicone implants manufactured by Mentor. During the 1992 surgery, the operating physician discovered that the previous silicone Dow implants had ruptured, and that silicone had escaped into Plaintiff's breast tissue. In March of 1993, Plaintiff underwent breast surgery again, at which time

her Mentor implants were replaced with another set of Mentor implants. Finally, in March of 1994, Plaintiff had the Mentor silicone implants replaced with saline implants manufactured by McGhan.

Plaintiff claims that as a result of the silicone implants rupturing, she now experiences migraine headaches; arthralgia; symptoms of lupus, although tests come back negative for this disease; arthritis; autoimmune thyroiditis; irritable bowel syndrome; rashes; muscles and joint pain; leg swelling; sensitivity to the sun; and loss of hair. Plaintiff claims that during the time that she had the Heyer-Schulte implants, she experienced migraine headaches, rashes, and possibly leg swelling.

Plaintiff had filed the instant suit against Defendants and Dow Corning on October 22, 1993, claiming the breast implants manufactured by Defendants and Dow Corning were the proximate cause of injuries from which she suffered, and she sought damages for these injuries under twenty-eight theories including strict liability, negligence, failure to warn, and breach of express and implied warranties.

In October of 1996, Plaintiff received a Notification of Status letter regarding the settlement of a class action lawsuit filed against Defendants. Plaintiff opted out of the settlement class by signing the opt-out form so indicating on October 17, 1996. The opt-out form contained the following language:

> NOTE: The running of any applicable statutes of limitation or repose with respect to the claims against person and entities named as released parties in the original global

> settlement - except Dow Corning, Mentor, and Bioplasty -will resume *6 months* after the date this form is received in the claims office.

(J.A. at 80.) Plaintiff's signed opt-out form was mailed to the claims office on November 21, 1996. Plaintiff added a products liability claim to her October 22, 1993 complaint on October 23, 1996.

DISCUSSION

This Court reviews a district court's order on a motion for summary judgment *de novo*. *See Miller v. Am. Heavy Lifting*, 231 F.3d 242, 246-47 (6th Cir. 2000). Likewise, this Court reviews a district court's determination that a complaint was filed outside the relevant statute of limitations *de novo*. *See id.*

Defendants argue that the district court properly dismissed Plaintiff's claims as time-barred inasmuch as Kentucky's one-year statute of limitations bars Plaintiff's personal injury action. Defendants contend that Plaintiff's claims began to accrue on March 9, 1977, when she had the Heyer-Schulte implants removed and replaced with Dow Corning implants, and because Plaintiff did not file suit until 1993 or 1996, her claims with respect to Defendants were well beyond the one-year limit.

Defendants further contend that Plaintiff's claims are not saved by the application of Kentucky's discovery rule. According to Defendants, under that rule, the statute of limitations still began to run on March 9, 1977, because that was the point at which Plaintiff should have reasonably known

that the Heyer-Schulte implants caused her injury, even if she was not aware of the full extent of the injuries at that time. In other words, Defendants do not claim that the statute of limitations began to accrue immediately after she had the Heyer-Schulte implants on March 4, 1974; rather, Defendants argue that the point in time that it could be said that Plaintiff reasonably knew or "discovered" that the Heyer-Schulte implants caused her injuries was March 9, 1977, the date upon which she had the implants removed and replaced at the advice of her physician. In support of this contention, Defendants rely upon Plaintiff's testimony that she went to see Dr. Cole in March of 1976 because her "breasts hurt and they were still hard and still red and they were immobile and [she] was getting red rashes across them[,]" (J.A. at 231), and after Dr. Cole tried to correct the problems of which Plaintiff complained by performing capsulotomies, Plaintiff finally underwent surgery to have the Heyer-Schulte removed and replaced with Dow Corning implants on March 9, 1977. Therefore, according to Defendants, by March 9, 1977, Plaintiff knew of the injuries allegedly caused by the Heyer-Schulte implants - even if she was not fully aware of the extent of her injuries - such that Plaintiff's date of accrual for purposes of the statute of limitations was March 9, 1977, thereby making March 9, 1978 the last day of the statutory period.

Plaintiff responds by arguing that the date she reasonably became aware that her complaints were due to a defective product was in October of 1996 when she received the Notification of Status letter regarding the settlement of a class action lawsuit filed against Defendants. Plaintiff further argues that because the opt-out form provided that the applicable statute of limitations would "resume *6 months* after

the date [the] form was received in the claims office[,]" because Plaintiff's form was received in the claims office on November 21, 1996, and because she filed her products liability claim on October 23, 1996, she was well within the statue of limitations. Finally, Plaintiff argues that Defendants should not be allowed to assert the statute of limitations affirmative defense inasmuch as Defendants entered into the class action settlement thereby constituting an admission of fault; and, by opting out of the settlement agreement, the statute of limitations began a new. We disagree with Plaintiff's arguments.

A. Date Plaintiff's Claim Against Defendants Accrued for Injuries that She Allegedly Received as a Result of the Heyer-Schulte Implants

Under Kentucky law, a personal injury action must be commenced within one year after the cause of action accrued. *See* Ky. Rev. Stat. Ann. § 413.140(1)(a) (Banks-Baldwin 1991). Generally, this means that the plaintiff must file suit within one year of the alleged injury. *See Caudill v. Arnett*, 481 S.W.2d 668, 669 (Ky. 1972). However, Kentucky law also provides for an exception to this general rule through what is known as the "discovery rule." Recently, the Kentucky Supreme Court opined about this rule as follows:

> The discovery rule, a means by which to identify the "accrual" of a cause of action when an injury is not readily ascertainable or discoverable, was first enunciated in *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970), and later refined in *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1971): "The statute

> begins to run on the date of discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered." *Id.* This rule entails knowledge that a plaintiff has a basis for a claim before the statute of limitations begins to run. The knowledge necessary to trigger the statute is two-pronged; one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed. *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 641 (6th Cir. 1986). *See also Hazel v. General Motors Corp.*, 863 F. Supp. 435, 438 (W.D. Ky. 1994) ("Under the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct.").

Wiseman v. Alliant Hosps., Inc., 37 S.W.3d 709, 712 (Ky. 2001).

The Kentucky court explained that the discovery rule is dependant upon ascertaining the date on which the plaintiff had "actual or constructive knowledge of the injury which triggers the running of the statute of limitations." *See Wiseman*, 37 S.W.3d at 712. The court distinguished between the time the plaintiff discovered "harm" and the time the plaintiff discovered "injury" as being critical to the application of the discovery rule. *See id.* The former, discovered harm, does not trigger the running of the statute of

limitations inasmuch as "harm" is defined by the Restatement as "'the existence of loss or detriment in fact of any kind to a person resulting from any cause." *Id.* (quoting The Restatement (Second) of Torts § 7, comment (1965)). The court noted that "injury," on the other hand, is defined as "'the invasion of any legally protected interest of another[,]'" thus triggering the running of the statutory clock. *Id.* (quoting The Restatement (Second) of Torts § 7, comment (1965)). To illustrate, "harm could result from a successful operation where a communicated, calculated risk simply turns out poorly for the patient, although the medical treatment met the highest medical standards[;]" however, despite the existence of the "harm," there would be no injury in such a case. *Id.* (quoting *Hall v. Musgrave*, 517 F.2d 1163, 1168 (6th Cir. 1975) (Celebrezze, J., dissenting)).

Applying the discovery rule to the facts in *Wiseman*, the Kentucky Supreme Court found that the plaintiff's cause of action in that case did not accrue until "the fact of her injury became objectively ascertainable." *See* 37 S.W.3d at 713. In this regard, the court found that "while [the plaintiff] may have suspected that something went wrong during the surgery, that in and of itself was insufficient to accrue a cause of action." *Id.* The *Wiseman* court went on to hold that

> [a] legally recognizable injury does not exist until the plaintiff discovers the defendant's wrongful conduct. Because Appellant's injury was not readily apparent until the discovery of the piece of uterine probe, she was unaware that she had a viable claim for medical malpractice. A mere suspicion of injury due to medically unexplainable pain following an

> invasive surgery does not equate to discovery of medical negligence. . . . In order to trigger the statute of limitations, a plaintiff must discover the injury - the invasion of a legally protected interest. Appellant filed her medical malpractice complaint within one year from the date she became aware she had been injured as a result of Dr. Ulfe's negligence. As such, the trial court erred in granting summary judgment. *Id.*

In the matter at hand, Plaintiff claims that based upon *Wiseman*, the point in time that she became aware of "the invasion of a legally protected interest" was in 1996 when she received the Notification of Status letter regarding the settlement of the class action lawsuit. Plaintiff argues that, as in *Wiseman*, although she may have been aware that the Heyer-Schulte implants had caused her harm - or as Plaintiff specifically characterizes it, caused her dissatisfaction and discomfort - in March of 1977, leading her to have the implants removed and replaced, she was not aware that she had an injury for purposes of the discovery rule until she became aware that the product was defective.

Plaintiff was aware of physical injuries that she sustained such as breast hardness, immobility, redness, and a rash in 1977 when she had the implants removed. Plaintiff specifically attributed these injuries to the Heyer-Schulte implants in particular, as evidenced by her decision to have the Heyer-Schulte implants replaced with Dow Corning implants. Therefore, unlike the Plaintiff in *Wiseman* who experienced pain but was unaware that the pain was attributable to the uterine probe left in her body, Plaintiff in

the matter at hand was fully aware that the harm she experienced was attributable to the Heyer-Schulte implants, as evidenced by her decision to have them removed and replaced at the advice of her physician in order to ameliorate the injury. *See Wiseman*, 37 S.W.3d at 712-13. In addition, Plaintiff's argument in the district court, attributing the problems associated with her breasts due to a foreign substance in her body and not specifically to the Heyer-Schulte implants, flies in the face of her decision to have the implants replaced with implants manufactured by Dow Corning. Hence, the date of accrual for purposes of the statute of limitations is March 9, 1977, at the latest, and the statutory period ran on March 9, 1978, thereby rendering Plaintiff's 1993 complaint and the allegations made therein untimely. *See id.*

One could argue that although Plaintiff was aware of legally cognizable injury from the implants in 1993 when she filed her claim based on theories such as negligence, there is nothing in the 1993 claim to indicate that she knew of a legally cognizable injury based upon a defective product until 1996 when she received the Notification of Status letter. Accordingly, at least to her 1996 products liability action, the argument goes that the statute did not begin to run until October of 1996, thereby making the 1996 products liability action timely.

This argument is quickly loses its force upon review of Plaintiff's 1993 complaint. There, Plaintiff begins by stating as follows:

COMPLAINT AND ADOPTION BY REFERENCE

> 1. Plaintiff, Sherry Michals, a citizen and resident of Kentucky, states her claims against the defendants indicated below as follows and incorporates by reference the relevant portions of the Master Complaint on file in the case styled *In re: Silicone Gel Breast Implant Products Liability Litigation* (MDL-926), now pending in the United States District Court for the Northern District of Alabama, before the Honorable Sam C. Pointer, Civil Action File No. CV-92-P-10000-S.

(J.A. at 13 (emphasis in original).) Therefore, Plaintiff's contention that she could not reasonably be considered to have been aware of her products liability claim against Defendant until 1996 when she received the Notification of Status letter is disingenuous, at best. Obviously, Plaintiff not only was aware that the silicone implants were allegedly defective in 1993 when she filed her complaint, but in fact incorporated allegations of product defect into the 1993 complaint, as the first paragraph indicates.

B. Plaintiff's Argument that the Language of the Opt-Out Provision Tolled the Statute of Limitations

Plaintiff contends that pursuant to the language of the opt-out provision, the statute of limitations was tolled for six months from the time the claims office received Plaintiff's

opt-out form. As stated, the provision of the opt-out form upon which Plaintiff relies states as follows:

> NOTE: The running of any applicable statutes of limitation or repose with respect to the claims against person and entities named as released parties in the original global settlement - except Dow Corning, Mentor, and Bioplasty -will resume *6 months* after the date this form is received in the claims office.

(J.A. at 80.) According to the express language of this provision, the applicable statute of limitations is only tolled for six months to the extent that the statute has not already run. In other words, by stating that the applicable statute will *resume* six months after the opt-out form is received in the claims office, the provision necessarily assumes that the statute has not already run. Because the statute of limitations had long expired by the time Plaintiff sent the opt-out form to the claims office in October of 1996, this provision does not apply to save Plaintiff's claims.

C. Plaintiff's Contention that Defendants Waived the Right to Assert the Statute of Limitations as an Affirmative Defense

Plaintiff argues that as evidenced by the Notification of Status received by Plaintiff on October 2, 1996, Defendants waived their right to assert the statute of limitations as a defense. Plaintiff contends that by including Plaintiff in settlement negotiations and extending a settlement negotiation offer to her, Defendants waived their reliance on the statute of limitations. Plaintiff fails to cite any authority in

support of this contention, and we find the contention without merit in any event.

As argued by Defendants on appeal, Plaintiff's argument is wrong on several counts. First, in answering the complaint, Defendants specifically asserted the statute of limitations as an affirmative defense; second, Defendants expressly denied "any wrongdoing or liability" in the class action settlement; third, a settlement or an offer to settle cannot be used to prove liability under Fed. R. Evid.408; and fourth, it has been found that a defendant does not waive a statute of limitations defense merely by engaging in settlement negotiations with a plaintiff. *See Thompson v. The Capitol Police Bd.*, 120 F. Supp. 2d 78, 83-84 (D.D.C. 2000). We agree with Defendants in every respect and therefore conclude that Plaintiff's argument in this regard does nothing to change the conclusion that Plaintiff's claims are barred by the statute of limitations.

CONCLUSION

For the above-stated reasons, we **AFFIRM** the district court's order granting summary judgment to Defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:93CV-663-S

[Filed August 23, 2000]

SHERRY MICHALS	)
PLAINTIFF	)
v.	)
	)
BAXTER HEALTHCARE CORPORATION, et al.	)
DEFENDANTS	)
	)

MEMORANDUM OPINION

This matter is before the court on motion of the defendant, Baxter Healthcare Corporation ("Baxter"), for summary judgment in this product liability action. Baxter seeks summary judgment on statute of limitations grounds.

This action arose from the surgical implantation of silicone breast implants in the plaintiff, Sherry Michals ("Michals"). She has had five implantation procedures over the course of twenty years from 1974 to 1994.

In March of 1974, Dr. Leonard Weiner surgically implanted Heyer-Schulte silicone breast implants in Michals. In March of 1976, Michals saw Dr. Norman Cole because "her breasts hurt and they were still hard and still red and they were immobile." Michals depo. at 129-30. At that time she also had a rash. She underwent two manipulations, known as closed capsulotomy, to break the fibrous capsule tissue that had formed around the implants and caused them to harden. These steps proved to be unsuccessful long-term, and Dr. Cole recommended that Michals have the implants removed and replaced with a different product. On March 9, 1977, Michals had the Heyer-Schulte implants removed and replaced with Dow Corning silicone implants. In January of 1979, she had the left implant replaced with another Dow Corning implant. In September of 1992, she had the Dow Corning implants replaced with Mentor silicone implants. In 1993, Michals had reconstructive surgery during which she received another pair of Mentor implants. In September of 1994, she had the Mentor implants removed and replaced with McGhan saline implants.

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151-60, 90 S. Ct. 1598, 16 L. Ed. 2d 142 (1970); *Felix v. Young*, 536 F.2d 1126, 1134 (6th Cir. 1976). Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a

reasonable jury could return a verdict for the non-moving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253,288-89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962).

Baxter's motion for summary judgment relates only to the Heyer-Schulte implants that Michals received in 1974 and had removed in 1977. This action was filed on October 22, 1993 alleging defects in the implants. Baxter urges that the one-year statute of limitations for products liability actions, KRS 413.140(1), ran on March 9, 1978, one year after she had the Heyer-Schulte implants removed. Thus Baxter seeks dismissal on the ground that the claims against it are time-barred.

Michals contends that she was unaware that the problems she was experiencing were the result of the Heyer-Schulte implants until after 1992 when she heard about lawsuits being filed concerning them and had contacted an attorney. She filed suit in 1993, within one year of her purported discovery that her injury was attributable to the Heyer-Schulte implants. She contends that she "had no specific knowledge that there was any problem or defect" until the year he lawsuit was initially filed, and that "she initially believed that the problems she was experiencing occurred due to her body's response to the insertion of a foreign substance." Michals affidavit,¶¶ 1,2. She suggests

that the discovery, rule tolled the running of the statute until the time she fried suit.

Kentucky courts have only applied the so-called discovery rule in the context of malpractice and latent disease cases where the plaintiff has not known of his injury until after the statute had run. *Simmons v. South Central Skyworker's, Inc.*, 936 F.2d 268 (6th Cir. 1991).

> Kentucky's discovery rule provides that a cause of action does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, both his injury and the responsible party. *See. e.g., Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 818-19 (Ky..1991); *Tomlinson v. Siehl*, 459 S.W.2d 166, 167 (Ky. 1970). This rule is designed to protect the blamelessly ignorant plaintiff from losing the right to recover for an injury during the period in which the injury may remain inherently unknowable to the plaintiff. The typical scenarios for the application of the rule include medical malpractice and latent disease cases.

Hazel v. General Motors Corporation, 83 F.3d 422, unpubl. 1996 WL 198203.

In this case, Michals began experiencing problems with the implants sometime after June of 1974. She experienced problems of pain, redness, hardness and rash over a long period of time, causing her to seek further medical treatment in March, 1976. As of March of 1977, she

had problems significant enough to warrant, upon her doctor's recommendation, the removal of the implants and replacement of them with another manufacturer's product. It is apparent that both she and her doctor believed at the time that it was the Heyer-Schulte implants that were causing her problems. Michals agreed to the surgical removal of the implants. Although she believed that her body was having some sort of reaction to the insertion of a "foreign substance," she had another manufacturer's implants inserted in their place. While she may not have had specific knowledge of a defect, the fact that she replaced the Heyer-Schulte implants with those of another manufacturer leads to the inevitable conclusion that she believed that her problems were due to her body's reaction to the *Heyer-Schulte* implants in particular, and not that her body was intolerant of all foreign substances. Michals was in possession of sufficient information regarding her injury and its origin to enable her to investigate a potential defect. Indeed, the duty to do so began at the time she had the Heyer-Schulte implants removed. At that time the statute of limitations began to run. "In the products liability context, a potential plaintiff's awareness of an injury and of the instrumentality causing the injury is enough to trigger the limitations clock and to impose on the plaintiff the duty to discover the responsible parties. [citing *Hazel, supra.]" Reese v. General American Door Company,* 6 S.W. 3d 380 (Ky. App. 1999).

We find the *Hazel* case to be instructive. In *Hazel, the* plaintiff argued that he had no reason to know that the design of the automobile fuel system may have been faulty until he watched a "Dateline" segment years later. The court found that the plaintiff was clearly in a position to discover the alleged cause of his injuries within the one year statutory

period. The fact that, for whatever reason he was not motivated to investigate, was irrelevant. The court found that with reasonable diligence, causation could have been uncovered and the action timely fled.

In *Hazel the* plaintiff was unaware of the cause of the fire in the automobile in question. The fault in the fuel system was not apparent without further investigation. However, the court determined that the plaintiff was possessed of sufficient information to trigger his duty to investigate and discover the cause. We find theft-acts before us to pose a more compelling case for barring the product liability claim. At the time of her surgery in 1977, Michals had suffered injury in the form of breast pain, redness, hardness, immobility and rash, and had identified, through her investigation with her doctor, the cause of that injury as the Heyer-Schulte implants. She did not investigate the product for a defect, although she was aware that she had suffered an injury through the use of the product. She did not file suit within the statutory period. Rather she began litigation after becoming aware that others were doing so. Her failure to investigate and file suit within the one-year limitations period mandates dismissal of the claims.

Michals asserts that Baxter waived its right to pursue its statute of limitations defense by entering into a class action settlement. Michals suggests that Baxter's settlement constituted an admission of fault. She further contends that when she opted out of the settlement the limitations period for her claim began to run anew. Terms in the settlement agreement and the opt-out form refute Michals' contentions.

The Breast Implant Litigation Settlement Agreement states that "Defendants have denied and continue to deny

Plaintiffs' claims in the Complaint and other similar actions, have denied any wrongdoing or liability to Plaintiffs of any kind, and have raised numerous affirmative defenses..." Michals has not shown the court any legal basis for interpreting a settlement agreement as an admission of fault, especially in light of the affirmative statement contained in the document that liability is not admitted.

The Opt-Out Form states:

> Note: The running of any applicable statutes of limitation or repose with respect to claims against persons and entities named as released parties in the original global settlement...will resume 6 months after the date this form is received in the Claims Office.

By its terms, the form provided that the one-year statute of limitations applicable in this case would resume running six months after she opted out of the class. In this case, the statutory period had already expired. Thus, she had no additional time available to her in which to file suit. We have been shown nothing in this form or in law to suggest that Michals would receive a new statutory year eighteen years after the statute of limitations had run.

For the reasons set forth above, the motion of Baxter for summary judgment will be granted and the claims dismissed as to it. A separate order will be entered herein this date in accordance with

This 23rd day of August, 2000.

/s/_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:93CV-663-S

SHERRY MICHALS
PLAINTIFF

v.

BAXTER HEALTHCARE CORPORATION, et al.
DEFENDANTS

ORDER

Motion having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that the motion of the defendant, Baxter Healthcare Corporation, for summary judgment is GRANTED, and the action is DISMISSED AS TO SAID PARTY.

This 25th day of August, 2000.

/s/
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:93CV-663-S

SHERRY MICHALS
PLAINTIFF

v.

BAXTER HEALTHCARE CORPORATION, et al.
DEFENDANTS

ORDER

It appears that the failure of the defendant, Baxter International, Inc., to join in the motion for summary judgment was an Oversight, it appearing that the parties, Baxter Healthcare Corporation and Baxter International, Inc. have an identity of interests in this action. The plaintiff, Sherry Michals, has indicated her agreement in this regard. Motion having been made, and by agreement of the parties, IT IS HEREBY ORDERED AND ADJUDGED that the joint motion to amend briefing on Baxter's summary judgment motion (DN 57) is GRANTED and the memorandum opinion and separate order of the court entered August 23, 2000 are AMENDED to include the defendant, Baxter International, Inc., in their disposition. In accordance with the memorandum opinion, the motion for summary judgment is GRANTED, and the action is DISMISSED as to Baxter International, Inc. There being no just reason for delay in its entry, this is a final order.

This 29th day of August, 2000.

/s /_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6034

FERNICE JOHNSON and RICHARD JOHNSON, *Plaintiffs-Appellants,*	)
v.	)
SANDOZ PHARMACEUTICALS CORPORATION, *Defendant-Appellee.*	)

On Appeal from the United States District Court
for the Western District of Kentucky

BEFORE: NELSON, DAUGHTREY, and MOORE, Circuit Judges.

Martha Craig Daughtrey, Circuit Judge. Plaintiff Fernice Johnson appeals the district court's grant of summary judgment to the defendant, Sandoz Pharmaceuticals, in a products liability action in which Johnson alleged that her ingestion of Parlodel, an anti-lactation drug manufactured by Sandoz, caused her to suffer a stroke after the birth of her second child in mid-March 1991. Her stroke was diagnosed in early April 199 l, after she had suffered headaches for

several weeks. Johnson claims that at no time while she was taking the drug and at no time while she was suffering headaches did anyone inform her of the risks associated with Parlodel. In fact, Johnson claims that she did not learn of the alleged association between Parlodel and strokes until she saw a lawyer's advertisement in her local paper in late 1994 or early 1995. Less than a year later, she filed this products liability lawsuit against Sandoz. After a period of discovery, the district court entered summary judgment in favor of Sandoz, holding that Johnson's claims were barred by the one-year Kentucky statute of limitations.

When the record is viewed in the light most favorable to the plaintiff as non-movant, we conclude that there is a genuine issue of material fact concerning whether, in the exercise of reasonable diligence, the plaintiff should have discovered the alleged association between Parlodel and her stroke prior to reading the newspaper advertisement. We therefore reverse the judgment of - the district court and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 1991, Johnson, a 32-year-old Louisville resident, gave birth to her second child by Caesarean section at Humana Audubon Hospital in Louisville. The same day, because Johnson had chosen not to breast feed her son, Dr. Ernest Marshall prescribed her a two-week course of Parlodel to be taken twice daily. The package insert for Parlodel says that it is indicated for, among other things, the prevention of physiological lactation in new mothers electing not to breast feed. Johnson had previously taken Parlodel after the birth of her first child - also under a prescription from Dr. Marshall -

to no ill effect. The next day, while still in the hospital recovering from the Caesarean section, Johnson complained of a headache to hospital staff. The following day, March 14, she made the same complaint.

Johnson was discharged from the hospital on March 15, 1991, with a prescription for a pain medication and the remainder of the two-week course of Parlodel. A registered nurse visiting Johnson at her home on March 17 documented that Johnson was still complaining of headaches. Apparently, the nurse contacted one of the physicians in Dr. Marshall's office about Johnson's headache, and Johnson received another prescription for pain medication.

When Johnson was still experiencing headaches days later, she contacted a nurse in Dr. Marshall's office. The nurse asked Johnson to come in for a visit, which she did on March 28. At that time, a nurse checked Johnson's blood pressure and determined that it was elevated. Johnson - reported experiencing dizziness when she stood up. Blood work taken revealed abnormalities.

On the morning of March 30, Johnson called an ambulance to her home because of abdominal pain, nausea, vomiting and diarrhea. She reported to the ambulance crew that she had experienced headaches since the birth of her child on March 12, as well as intermittent numbness in her legs. The ambulance crew took Johnson back to Humana Hospital Audubon, and - after examination - she was diagnosed with gastroenteritis and sent home with medication for fever and diarrhea.

The very next day, Johnson again called an ambulance to her home, complaining of difficulty walking, as well as numbness and tingling in her right leg. This time, Johnson was admitted to a different hospital, Humana Hospital, University of Louisville. Johnson did not disclose to her treaters at this new hospital that she had taken Parlodel after giving birth. Tests and examinations at the hospital revealed that Johnson had suffered a stroke.

The package insert for Parlodel in effect at the time Johnson suffered her stroke notes reports of stroke in patients using the drug for the prevention of physiological lactation. Johnson did not receive this insert, nor did she receive any warnings about potential side-effects.

A little more than three years after experiencing the stroke, Johnson saw an advertisement in the Louisville *Courier-Journal* placed by attorney Gary Becker. (The exact date Johnson reviewed the advertisement is unknown, but an affidavit from Becker states that his Parlodel advertisement ran for the first time no earlier than May 24, 1994.) The advertisement targeted women who had taken Parlodel for the treatment of postpartum physiologic-at lactation and had suffered strokes or heart attacks. Upon learning for the first time of the alleged association between Parlodel and strokes, Johnson contacted Becker regarding her own experience.

Within a year of reading Becker's advertisement, on April 24, 1995, Johnson and her husband filed suit against Sandoz Pharmaceuticals Corporation, alleging that her stroke and the continuing injuries that had resulted from the stroke were caused by her ingestion of Parlodel in 1991. Subsequently, Sandoz moved for summary judgment on the

grounds that the Johnsons' claims were time-barred as a matter of Kentucky law. The district court agreed, holding that the one-year statute of limitations began to run at the time of Johnson's stroke in April 1991. At that time, the district court held, Johnson "knew or should have known enough facts to trigger the duty to engage in further inquiry so as to discover that the Parlodel possibly caused her stroke." In so concluding, the district court noted that, in the late 1980's, at the request of the Food & Drug Administration, Sandoz changed its labeling regarding potential risks associated with Parlodel to include certain"serious adverse experiences," among them stroke. Further, the district court concluded that it was Johnson's failure to inform her doctors that she had taken Parlodel that "precluded them from advising her of a possibility that the drag had caused her stroke." Accordingly, the district court granted final summary judgment to Sandoz, and Johnson now appeals.

DISCUSSION

The rule is well-settled that, in general, a products liability claim accrues at the time of injury. Typically, the injury is discovered and the cause identified more or less simultaneously. Under such circumstances it is easy to identify the accrual date of the cause of action. In other cases, particularly involving exposure to harmful substances, there may be a lag between the defendant's injury-causing conduct and the plaintiff's discovery of his or her injury. In this latter category of cases, many times there is also a lag between discovery of the injury and discovery of the injury's cause, further complicating the task of determining the date of accrual. Johnson's is such a case.

Under Kentucky law, a claim for personal injury must be brought within one year "after the cause of action accrued." Ky. Rev. Stat. Ann. § 413.140(1)(a). Here, the question is whether the district court was correct in holding as a matter of law that Johnson's claim accrued at the time of her stroke in April 1991.

In *Louisville Trust Co. v. Johns-Mansville Prods. Corp.*, 580 S.W.2d 497, 501 (Ky. 1979), an asbestos case, the Kentucky Supreme Court expressly embraced what it called a "workable and just" rule articulated by the New Hampshire Supreme Court postponing the date of accrual until such time as the plaintiff had a reasonable opportunity to discover that his injury may have been caused by the defendant's wrongdoing. In endorsing the New Hampshire role, the court stated it was "convince[d]" that "the clear trend in most jurisdictions in cases dealing with drags, chemicals, and asbestos has been to apply some variation of the discovery rule which is based on equitable considerations." *Id.* The articulation of the rule -- as embraced in *Louisville Trust* -- is as follows:

> In a case, such as the one before us, in which the injury and the discovery of the causal relationship do not occur simultaneously, it is important to articulate exactly what the discovery rule means. We believe that the proper formulation of the rule and the one that will cause the least confusion is the one adopted by the majority of courts: A cause of action-will not accrue until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that

> he has been injured *but also that his injury may have been caused by the defendant's conduct.*

Id. (quoting *Raymond v. Eli Lilly & Co.*, 371 A.2d 170, 174 (N.H. 1977)) (emphasis added).

Sandoz appears to urge us to hold that under Kentucky law, Johnson's claim accrued on the date of injury, regardless of what opportunity she had to discover the alleged causal relationship between Parlodel and her stroke. In support, Sandoz cites a 1990 Kentucky Supreme Court case suggesting that the court, without engaging in any analysis, has effectively repudiated the rule set forth *Louisville Trust Co.* In that case, a wrongful death action, the court said flatly that "[e]ven in cases where the discovery rule has been applied, we have held that he cause of action accrues when *the fact of injury* is known." *McCollum v. Sisters of Charity,* 799 S.W.2d 15,19 (Ky. 1990). Only a year after *McCollum,* however, the Kentucky Supreme Court expressly reaffirmed the rule articulated in *Louisville Trust Co.* in a case involving exposure to a harmful chemical. *See Perkins v. Northeastern Log Homes,* 808 S.W.2d 809 (Ky. 1991). There, in discussing the evolution of the discovery rule in Kentucky, the court observed that in *Louisville Trust Co.,* it had extended the discovery rule to actions against manufacturers of defective products in cases involving latent disease and had "addressed a further problem in latent disease cases.., regarding knowledge of the 'causal connection' between the product and the disease, resolving this problem by embracing the [rule announced in] anew Hampshire Supreme Court case" Id. at 818. As a result, courts applying Kentucky law have repeatedly articulated the Kentucky rule, at least with

respect to latent injuries caused by exposure to a harmful substance, as requiring both discovery of injury *and* a reasonable opportunity to discover the causal relationship before the claim accrues. *See, e.g., Reese v. Gen. Am. Door Co.*, 6 S.W.3d 380 (Ky. Ct. App. 1999); *Douthitt v. E.I. Dupont De Nemours & Co.*, 181 F.3d-100, 1999 WL 357795, at [1] (6th Cir. May 20, 1999); *Blanton v. Cooper Indus., Inc.*, 99 F. Supp.2d 797, 801 (E.D. Ky. 2000). Indeed, the district court below, in analyzing whether Johnson should have known of the risks associated with Parlodel, performed an analysis consistent with *Louisville Trust Co.* in ruling for Sandoz.

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[1] Sandoz cites one unpublished opinion from this circuit that, citing *McCollum*, appears to hold that personal claims accrue when injury is discovered, with no inquiry regarding a reasonable opportunity to identify cause. *Gregory v. Poor*, 70 F.3d 1271,1995 WL 704195 (6th Cir. Nov. 29, 1995). However, the Kentucky Supreme Court has since made clear that this proposition is incorrect. *See Wiseman v. Alliant Hosp., Inc.*, 37 S.W.3d 709 (Ky. 2000) (applying discovery rule in medical malpractice case to defer accrual of plaintiff's claim to such time as plaintiff discovered her symptoms were caused by negligence). Moreover, at least one Kentucky court has interpreted *McCollum* as confined to the wrongful death context and not affecting the application of the discovery rule in latent injury cases. *See, e.g., Gray v. Commonwealth*, 973 S.W.2d 61 (Ky. Ct. App.1997) ("The discovery rule does not operate to toll the statute of limitations in a wrongful death case filed in a circuit court, absent a defendant's fraudulently concealing or misrepresenting the circumstances of death, because the cause of action accrues when the fact of injury is known; the decedent's death provides the notice to investigate... The discovery rule applies to latent injury cases... ") (citing *McCollum*).

Sandoz also argues strenuously that the rule embraced by the Kentucky Supreme Court in *Louisville Trust Co.* applies only where the plaintiff's injury does not manifest itself for a long period - measured in years - after exposure to the harmful agent, regardless of whether the plaintiff could have learned by exercising reasonable diligence of the injury's cause. Sandoz points out that *Louisville Trust Co.* involved-a latency period of"many years," and highlights the court's statement that it-had decided "to extend the discovery rule ..: to-tort actions from injury resulting from a latent disease caused by exposure to a harmful substance." 580 S.W.2d at 499.

However, a recent, thorough analysis of the discovery rule by the Kentucky Supreme Court, released after the district court rendered its decision in this case, shows that Sandoz's reading of the discovery rule is unduly cramped. *See Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709 (Ky. 2000). In *Wiseman,* the plaintiff began feeling pain in her tailbone immediately after undergoing a gynecological surgery in August 1989. *Id* at 710-11. She informed her gynecologist, who told her that the pain would likely disappear. *Id.* at 711. At a post-operative check-up, Wiseman complained again, to the same doctor. One month later, she saw her family doctor, who diagnosed her with a broken tailbone and prescribed pain pills. Over the next several years, Wiseman continued to experience pain in her lower back and sought treatment from more doctors. Finally, in January 1996, she saw a surgeon who, after examination, opened the affected area and found a piece of a metal surgical instrument located under the surface of Wiseman's skin. Eleven months later, Wiseman sued her gynecologist, and the hospital where she had undergone the 1989 procedure, for medical malpractice. *Id.*

The trial court in *Wiseman* entered summary judgment for the gynecologist on the grounds that the one-year statute of limitations had long since expired on Wiseman's personal injury claims. The Kentucky Supreme Court reversed and held that the discovery rule "entails knowledge that a plaintiff has a basis of a claim before the statute of limitations begins to run." *Id.* at 712. In reaching its holding, the court drew a distinction between "discovery of harm" and "discovery of injury." *Id.* Although Wiseman discovered that she had been *harmed upon* experiencing pain immediately after surgery, she was unaware of her *injury* - defined as "the invasion of a [] legally protected interest" - until many years later. *Id.* Because Wiseman's injury was *"not readily apparent," id.* at 713 (emphasis added), until discovery of the piece of metal embedded under her skin, in spite of her persistent and obvious symptoms, Wiseman was unaware of her claim. The court made clear that "Ia] mere suspicion of injury due to medically unexplainable pain following an invasive surgery does not equate to discovery of medical negligence." Id.

We believe that the Kentucky discovery rule, as reflected in *Louisville Trust Co.* and *Wiseman,* is applicable here. The relatively short period between exposure and harm, rather than being dispositive, is something the fact-finder may consider, along with the other surrounding circumstances, in determining whether Johnson should have known, in the exercise of reasonable diligence, of the alleged causal relationship between Parlodel and her stroke. Those other circumstances include Johnson's claim that she was never informed by her doctors of the risk of stroke associated with Parlodel or provided with a copy of any literature containing warnings about the drug. She had taken the drug after her first pregnancy without experiencing any problems. Parlodel

was not the only medication Johnson was taking in the days following her Caesarean section when she began experiencing symptoms - she was also taking at least one pain-Miler. Assuming that she took her course of Parlodel as dispensed, Johnson would have finished taking the drug on or about March 26, 1991, several days before suffering the stroke.

Under these circumstances, the question of whether reasonable diligence should have led Johnson to associate Parlodel with her stroke cannot be answered without examining - in a light most favorable to Johnson - the events in the weeks leading to her stroke. Johnson's medical records demonstrate that upon experiencing headaches in the days following the birth of her child, while still in the hospital, Johnson repeatedly reported her symptoms to the hospital staff. More than two weeks after giving birth - and a couple of days after she presumably finished taking Parlodel - Johnson returned to the office of the doctor who had prescribed her the drug, reporting headaches and dizziness. At no time were Johnson's reports of symptoms met with any information from her doctor or any member of the hospital staff that the problems she had been experiencing, both in and out of the hospital, might have been associated with one of the drugs that she had been prescribed. From this, a fact-finder might conclude not only that the doctors and nurses treating Johnson at Humana Audubon hospital - the hospital where she was prescribed Parlodel - were aware of the medications Johnson was taking, but also that a reasonable person in Johnson' s position would *believe* they were aware of them and would advise her Of any associated risks at the time she reported her symptoms. The Kentucky Supreme Court has noted in the medical malpractice context that "the nature of the tort and the character of the injury usually require reliance

on what the patient is told by the physician or surgeon." *See Wiseman,* 37 S.W.3d at 713. Here, too, in the context of exposure to an allegedly harmful prescription drug, Johnson had a "right to rely on the physician's knowledge and skill." *Id.* The question of whether Johnson's conduct fell short of reasonable diligence under those circumstances is one for the jury to decide.

The district court placed great weight on Johnson's failure to disclose to emergency medical personnel, in the immediate aftermath of her stroke, the fact that she had been taking Parlodel after the birth of her child. A jury may do the same. However, we believe that there is a genuine issue of fact as to whether such an omission by a woman who has just suffered a stroke after weeks of reporting headaches and related symptoms to the doctors who had originally prescribed her that medication means, as a matter of law, that she did not exercise reasonable diligence within the meaning of *Louisville Trust Co.*

CONCLUSION

In products liability cases arising from exposure to allegedly harmful substances, Kentucky law requires that a plaintiff be given a reasonable opportunity to discover the causal relationship between the substance and her injury before the statute of limitations clock begins to run against her. *See Louisville Trust Co.,* 580 S.W.2d at 501. Here, Johnson's ingestion of Parlodel and her subsequent stroke did not occur simultaneously, and the surrounding circumstances made the alleged causal relationship less than obvious to a lay person. Accordingly, we conclude that the case must be remanded for determination by a jury whether Johnson, at the

time of her stroke, "in the exercise of reasonable diligence should have discovered not only that [she] ha[d] been injured but also that h[er] injury may have been caused by" her use of Parlodel. *Id.*

The judgment of the district court granting summary judgment to the defendant is, therefore, REVERSED, and the case is REMANDED for, further proceedings.